Supreme Court, U.S.
FILED
DEC 6 · 2007
OFFICE OF THE CLERK

113 (26) (25)

Nos. 07-984 and 07-990

B926

In the Supreme Court of the United States

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

GREGORY G. GARRE
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

4/14/07

TABLE OF CONTENTS

Page

A. The text and structure of the CWA make clear that discharges of fill material are regulated under Section 404 of the Act rather than under Section 402 4

B. Neither Section 306 itself, nor any performance standard promulgated by EPA pursuant to that provision, limits the Corps' permitting authority under Section 404 6

C. Under established principles of administrative law, this Court owes deference to the responsible agencies' shared understanding on the question presented 11

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 3, 13, 14

Barnhart v. *Walton*, 535 U.S. 212 (2002) 17

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 4

Federal Express Corp. v. *Holowecki*, 128 S. Ct. 1147 (2008) 14

Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 18

Long Island Care at Home, Ltd. v. *Coke*, 127 S. Ct. 2339 (2007) 15, 18

National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 12

National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 21

Cases—Continued: Page

Reserve Mining Co. v. *EPA*, 514 F.2d 492 (8th Cir. 1975) 5
Smiley v. *Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) 21

Statutes, regulations and rules:

Clean Water Act, 33 U.S.C. 1251 *et seq.*:
§ 301, 33 U.S.C. 1311 ..... 2, 9, 19
§ 301(a), 33 U.S.C. 1311(a) 6, 7
§ 306, 33 U.S.C. 1316 ..... *passim*
§ 306(e), 33 U.S.C. 1316(e) 2, 7, 8, 10
§ 307, 33 U.S.C. 1717 ..... 7, 8, 9, 10
§ 307(a)(5), 33 U.S.C. 1317(a)(5) 7
§ 318, 33 U.S.C. 1328 10
§ 402, 33 U.S.C. 1342 ..... *passim*
§ 402(a), 33 U.S.C. 1342(a) 4
§ 402(a)(1), 33 U.S.C. 1342(a)(1) 10
§ 402(k), 33 U.S.C. 1342(k) 9
§ 404, 33 U.S.C. 1344 ..... *passim*
§ 404(a), 33 U.S.C. 1344(a) 2, 4, 5, 10
§ 404(b)(1), 33 U.S.C. 1344(b)(1) 4, 7, 8, 20
§ 404(p), 33 U.S.C. 1344(p) 9, 10
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 8
Rivers and Harbor Act of 1899, ch. 425, 30 Stat. 1121:
§ 10, 30 Stat. 1151 5
§ 13, 30 Stat. 1152 5

Regulations and rules—Continued: Page

33 C.F.R.:
Pt. 323:
Section 323.2(e)(1) 20
Section 323.2(f) 20
40 C.F.R.:
Pt. 122:
Section 122.3(b) 13
Pt. 125:
Section 125.4(d) (1973) 13
Pt. 230:
Section 230.10 4
Section 230.10(a)(4)-(5) 8
Section 230.10(b)(2) 7, 8
Section 230.10(b)(3)-(4) 8
Pt. 232:
Section 232.2 20
Pt. 440, Subpart J 17
Section 440.104(b)(1) 3, 12, 14

Miscellaneous:

The Chicago Manual of Style (15th ed. 2003) 13
42 Fed. Reg. 37,145 (1977) 14
45 Fed. Reg. 33,294 (1980) 14
65 Fed. Reg. (2000):
p. 21,292 19
p. 21,297 19
p. 21,299 19

Miscellaneous—Continued: Page

67 Fed. Reg. (2002):

p. 31,133 19

p. 31,135 ..... 5, 16, 20

In the Supreme Court of the United States

No. 07-984

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

No. 07-990

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

Taken together, three crucial aspects of the statutory and regulatory scheme demonstrate that the Army Corps of Engineers (Corps) properly exercised permitting jurisdiction over the proposed discharge of mine tailings at issue in this case. Those provisions further demonstrate that the Corps, in making its permitting decision, was not required to apply a new-source performance standard issued by the

Environmental Protection Agency (EPA) pursuant to Section 306 of the Clean Water Act (CWA), 33 U.S.C. 1316.

First, Section 404 of the CWA states, without qualification or exception, that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters." 33 U.S.C. 1344(a). Second, the substantive criteria governing the Corps' permitting decisions under Section 404, which are tailored to the distinct concerns raised by discharges of fill and dredged material, do not require compliance with EPA effluent limitations promulgated under Section 301 or 306. See Gov't Br. 19-21; SEACC Br. 37.[1] Third, the proposed discharge of mine tailings at issue here constitutes a "discharge of fill material" as that term has been defined by the Corps and EPA in a regulation (the fill rule) issued jointly by the two agencies in 2002. See Gov't Br. 33-35; SEACC Br. 20 (acknowledging that proposed discharge "meets the agencies' new definition of 'fill material'").

Respondent SEACC does not dispute any of the three propositions set forth above. SEACC nevertheless contends that the permit at issue here is unlawful because Section 306(e), which prohibits "any owner or operator of any new source" from "operat[ing] such source in violation of any standard of performance applicable to such source," 33 U.S.C. 1316(e), precludes the issuance of a Section 404 permit for the discharge of pollutants that are covered by EPA new-source performance standards. Section 306(e), however, is limited by its terms to "applicable" performance standards, and it does not speak to the question whether a particular performance standard is "applicable" to any specific discharge. Rather, that question is resolved by exam-

---

[1] All citations to "SEACC Br." refer to the brief on the merits filed by respondents Southeast Alaska Conservation Council, et al.

ining the dual permitting structure of the Act (which vests the Corps with permitting authority for discharges of dredged or fill material under Section 404, leaving EPA with authority to permit all *other* discharges under Section 402) and the distinct requirements governing Section 404 permits (which, as SEACC concedes, do not require compliance with Section 306 effluent limitations).

Because EPA has broad discretion in establishing the relevant new-source performance standard (40 C.F.R. 440.104(b)(1)), SEACC's argument ultimately reduces to the contention that the Section 404 permit in this case frustrates EPA's policy judgments. EPA itself, however, does not share that view. It not only joined the government's opening brief in this case, but more to the point—as that brief explained—explicitly determined (in its 2004 Mine Tailings memorandum) that the new-source performance standard does not apply to the proposed tailings discharge. EPA's reasonable view as to the applicability of its own regulation warrants substantial deference. See *Auer* v. *Robbins*, 519 U.S. 452, 460-461 (1997).

In arguing that the Corps' permitting decision in this case contravenes stated agency policies, SEACC relies in part on a *proposed* exception to the 2002 fill rule's definition of "fill material"—an exception that the agencies ultimately declined to adopt. SEACC also relies on various snippets from the rule's preamble suggesting that discharges subject to effluent limitations would be regulated under Section 402. Those inconclusive and conflicting statements cannot override the clear text of the fill rule, its articulated purpose of clarifying the line between the Corps' and EPA's permitting authority, and the agencies' considered application of the Act and the rule in this case.

In sum, while the plain terms of Sections 402 and 404 of the CWA alone require reversal of the Ninth Circuit's deci-

sion, the agencies' reasonable and longstanding interpretation of those provisions is at a minimum entitled to deference and leads to the same conclusion. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

A. The Text And Structure Of The CWA Make Clear That Discharges Of Fill Material Are Regulated Under Section 404 Of The Act Rather Than Under Section 402

1. As our opening brief explains (at 18-19), the division of CWA permitting authority between the Corps and EPA turns not on whether a proposed discharge implicates an EPA effluent limitation, but on whether the discharge involves "dredged or fill material." Section 404 states without qualification that the Corps may issue permits for the "discharge of dredged or fill material." 33 U.S.C. 1344(a). Section 402 governs *other* discharges by stating that, "*[e]xcept as provided in section [318 and 404]*, the Administrator may * * * issue a permit for the discharge of any pollutant." 33 U.S.C. 1342(a) (emphasis added).

SEACC's admonition (Br. 31-32) that implied exceptions to statutory requirements are disfavored is therefore beside the point. Under the *express* terms of Sections 404 and 402, the authority to issue permits for discharges of fill material is vested in the Corps and denied to EPA. That dual-permitting regime effectuates Congress's determination that the two types of discharges should be treated differently in light of their different impacts. See Gov't Br. 19-21. In particular, as implemented through a joint Corps/EPA regulation that defines the term "fill material," that regime ensures that discharges—like those at issue here—that have the effect of replacing a portion of a covered water or changing its bottom elevation will be regulated under the distinct permitting criteria set forth in the Section 404(b)(1) Guidelines. See 33 U.S.C. 1344(b)(1); 40 C.F.R. 230.10.

2. SEACC contends that the discharge of any pollutant covered by an EPA effluent limitation guideline must be regulated by EPA under Section 402, rather than by the Corps under Section 404, even if the discharge constitutes "fill material" under the applicable regulation. SEACC Br. 21-23, 35-38. Acceptance of that contention would effectively rewrite Section 404(a) to provide that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters at specified disposal sites, *except when EPA has promulgated a new-source performance standard or effluent limitation that covers the relevant source.*" There is no justification for importing that language into the Act and imposing a limitation on the Corps' permitting authority that Congress declined to enact. Acceptance of SEACC's position would also mean that, in cases where the relevant effluent limitation is not a zero-discharge standard, EPA could issue permits for discharges that both EPA and the Corps regard as discharges of "fill material"—something that EPA has never done and that Congress would not have expected it to do. See 67 Fed. Reg. 31,135 (2002) ("EPA has never sought to regulate fill material under effluent guidelines.").[2]

---

[2] Contrary to SEACC's suggestion (Br. 42-43), the Eighth Circuit's 1975 decision in *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 529-531 (requiring permit for disposal of mine tailings into Lake Superior under Section 13 of Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1152, in addition to an existing permit under Section 10, 30 Stat. 1151, of that Act) has no bearing on the question whether Section 402 or 404 governs here. As an initial matter, that case focused on the Rivers and Harbors Act, not the CWA. Although Sections 10 and 13 of the Rivers and Harbors Act were precursors to Sections 404 and 402 of the CWA, respectively, Sections 10 and 13 (unlike Sections 404 and 402) were not viewed as mutually exclusive. See *Reserve Mining Co.*, 514 F.3d at 530 & n.73. Moreover, the court in *Reserve Mining Co.* did not determine whether the discharge at issue was a discharge of "fill mater-

B. Neither Section 306 Itself, Nor Any Performance Standard Promulgated By EPA Pursuant To That Provision, Limits The Corps' Permitting Authority Under Section 404

SEACC argues that, even if a particular discharge falls within the current regulatory definition of "fill material," the Corps lacks authority to permit the discharge if the relevant pollutant is covered by a performance standard issued by EPA pursuant to Section 306. In SEACC's view, the Corps lacks authority to regulate in those circumstances even if the proposed discharge complies with the relevant standard of performance. SEACC Br. 23-36, 36-38. That argument lacks merit.

1. Although SEACC defends the court of appeals' ultimate conclusion that the permit at issue here is invalid, it does not endorse the textual analysis that led the court to that result. The Ninth Circuit concluded that Congress's use of the word "and" as a connector in Section 301(a) "indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, *even those that facially qualify for permitting under § 404*." 07-984 Pet. App. 15a (emphasis added). SEACC, by contrast, acknowledges that the connector "and" in Section 301(a) signifies only that discharges must comply with each *applicable* provision. SEACC Br. 38-39; see Gov't Br. 24-25. Accordingly, SEACC recognizes that, because Section 301(a) does not "answer whether a particular section applies to a particular source or discharge," it does not resolve the question presented in this case. SEACC Br. 39.

---

ial" as then defined, nor is it clear whether that discharge would satisfy the current definition of fill material. By contrast, there is no doubt that the discharge of mine tailings proposed here now qualifies as a discharge of fill material within the meaning of Section 404. See Pt. C, *infra*.

Instead, SEACC relies primarily on the text of Section 306(e), which makes it unlawful to operate a new source "in violation of any standard of performance applicable to such source." 33 U.S.C. 1316(e). But Section 306(e), like Section 301(a), is not dispositive here because it does not address the question whether new-source performance standards are "applicable" to discharges of fill material. And, as our opening brief explains (at 21-23, 25), the most natural reading of the Act as a whole is that the availability of a Section 404 permit for a discharge of fill material is not contingent on the regulated party's compliance with any new-source performance standard promulgated under Section 306. Neither Section 404 nor the Section 404(b)(1) Guidelines require compliance with EPA effluent limitations, except for toxic effluent limitations promulgated under Section 307. See 40 C.F.R. 230.10(b)(2).

Notably, Section 307 authorizes EPA (in consultation with the Corps) to subject discharges of dredged material to toxic effluent limitations. 33 U.S.C. 1317(a)(5). If EPA exercises that option, however, the Corps is not divested of its permitting authority over the relevant discharge, but rather is directed to apply specific substantive criteria in making its permitting decision. Congress's treatment of toxic effluent limitations strongly suggests that, if Congress *had* intended for discharges of fill material to be subject to new-source performance standards, it would have added to Section 306 a provision analogous to Section 307(a)(5). Section 306 contains no such provision, however, and SEACC expressly disavows any contention that the Corps, in ruling on Section 404 permit applications, must or should apply new-source performance standards promulgated by EPA. SEACC Br. 37. The alternative that SEACC advocates —*i.e.*, that permitting authority over fill material is transferred from the Corps to EPA whenever a Section 306 per-

formance standard addresses the source of the discharge—is inconsistent not only with the allocation of permitting authority established by Sections 402 and 404, but also with Congress's treatment of toxic discharges under Section 307.

2. SEACC's other textual arguments are likewise unpersuasive.

a. Citing the Section 404(b)(1) Guidelines' introductory reference to "other laws" that may preclude a Section 404 permit in particular circumstances, SEACC argues that the Corps "must also refrain from authorizing discharges that would violate section 306(e)." SEACC Br. 27. SEACC's reference to "discharges that would violate section 306(e)" does not advance its argument because it simply assumes that discharges of fill material are subject to Section 306 new-source performance standards—precisely the question at issue. The Guidelines' reference to "other laws" cannot plausibly be read to encompass Section 306(e), which is part of the CWA itself rather than a separate statute such as the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* Although the Guidelines identify numerous statutes that may limit the Corps' discretion (see 40 C.F.R. 230.10(a)(4)-(5) and (b)(3)-(4)), Section 306(e) is not one of them. SEACC's inference is especially implausible given that the Guidelines explicitly reference other CWA provisions, such as Section 307, as limitations on the scope of permissible discharges. See 40 C.F.R. 230.10(b)(2).

Moreover, when one of the laws referenced in the Section 404 Guidelines applies to a proposed discharge of fill material, the Corps retains permitting authority over the proposed discharge, though its decision whether to grant or deny the permit application must be consistent with the applicable law. Cf. p. 7, *supra*. The existence of other legal constraints on the Corps' discretion simply underscores the

anomalous nature of the regime that SEACC advocates, under which the purported applicability of one such constraint (an EPA performance standard) has the effect of transferring permitting authority to a different federal agency. SEACC identifies no other law whose potential applicability to a particular discharge of fill material divests the Corps of authority to determine (through the permitting process) whether and under what conditions the proposed discharge should be allowed.

b. SEACC also observes (Br. 27-28) that, whereas Section 404(p) shields dischargers who comply with a Section 404 permit from actions enforcing Sections 301 and 307, but not from actions enforcing Section 306, Section 402(k) provides that NPDES permittees are deemed to be in compliance with Section 306 as well. From that comparison, SEACC concludes (Br. 28) that Section 404 does not "exempt[]" discharges of fill material from compliance with Section 306. That is incorrect.

At least where a particular standard of performance is not a zero-discharge standard, a determination that the standard applies to a particular discharge does not necessarily mean that the discharge is precluded. Thus, if Congress had intended for Section 306 performance standards to apply to discharges of fill material, it would have authorized either the Corps or EPA to determine, through the appropriate permitting process, whether the applicable standard is satisfied in a particular case. If Congress had expected the Corps to apply Section 306 performance standards in ruling on Section 404 permit applications, it presumably would have included a reference to Section 306 in Section 404(p), as it did in Section 402(k), to ensure that the Corps' permitting decision would preclude a subsequent citizen suit alleging non-compliance with Section 306. See Gov't Br. 22 n.5. The absence of any such reference in Sec-

tion 404(p) strongly indicates that one theoretically possible means of addressing discharges of fill material in which the relevant constituent substance is covered by an EPA performance standard—*i.e.*, vesting the Corps with permitting authority over such discharges, while requiring the Corps to apply the performance standard in its substantive permitting decision (as the Corps is required to do with Section 307 toxic effluent limitations)—is not what Congress intended.

It does not follow, however, as SEACC contends, that permitting authority over that category of discharges resides with EPA. That approach is inconsistent with the text of Sections 402 and 404 and with the overall structure of the Act, under which, as discussed, the identity of the appropriate permitting agency for a particular discharge turns solely on whether "dredged or fill material" is involved. As explained above, the CWA explicitly vests the Corps rather than EPA with permitting authority over *all* discharges of "dredged or fill material."

Rather, the more natural inference from the various statutory provisions taken together is that Section 404 permittees have no need of an exemption from suits to enforce Section 306 because neither Section 306(e) nor any Section 306 performance standard applies to discharges of fill material in the first place. That reading fully explains the absence of any reference to Section 306 in Section 404(p). It also respects the basic division of permitting authority between the Corps, which regulates "discharge[s] of dredged or fill material," 33 U.S.C. 1344(a), and EPA, which is authorized to issue discharge permits "[e]xcept as provided in sections" 318 and 404, 33 U.S.C. 1342(a)(1).

c. SEACC also argues that, if Section 306(e) does not apply to discharges of fill material, Section 404 permittees will circumvent EPA effluent limitation guidelines, and

harmful wastewater discharges will escape effective regulation. See SEACC Br. 44-45. That is incorrect. Section 404's permitting framework itself provides for rigorous, broad-scale environmental review of proposed fill-material discharges by the Corps, all subject to EPA's ultimate veto. See Gov't Br. 20-23. Moreover, for any discharges into navigable waters beyond the initial deposit of fill material, dischargers must obtain a Section 402 permit and comply with all its requirements. In this case, for example, EPA applied the effluent limitations set forth in the new-source performance standard (in conjunction with even stricter Alaska water-quality standards) to discharges from the Lower Slate Lake impoundment to downstream waters. See Gov't Br. 11; J.A. 287a-331a. Before issuing the Section 402 permit, EPA required Coeur to take various mitigation measures to ensure compliance with those standards. *Ibid.*[3]

C. Under Established Principles Of Administrative Law, This Court Owes Deference To The Responsible Agencies' Shared Understanding On The Question Presented

SEACC's discussion of the agencies' interpretations of the Act blurs two distinct issues. First, the Corps and EPA have consistently agreed that, once a particular discharge is found to constitute "fill material," permitting authority over that discharge is vested in the Corps under Section 404 rather than in EPA under Section 402. The agencies' position on that question has not changed over time, and

[3] At least in some circumstances, regulating the type of discharges at issue here under Section 404 may lead to better overall environmental outcomes, once the alternatives are considered. See Gov't Br. 40. In this case, the Forest Service and Corps determined that the proposed wet tailings impoundment in Lower Slate Lake was "environmentally preferable" to the alternative dry tailings disposal in adjacent wetlands. J.A. 354a; see J.A. 218a. SEACC elected not to challenge that determination.

the agencies have never recognized an exception to that rule for discharges of pollutants that would otherwise be subject to an EPA performance standard. By contrast, the standards used by the agencies to determine whether particular discharges constitute "fill material" *have* changed over time. In the 2002 fill rule, however, the Corps and EPA resolved their prior disagreement on that issue and jointly promulgated a regulatory definition of the term "fill material." Under the principles announced in *Chevron*, this Court owes deference to the agencies' current, considered views on both issues.

1. Since the CWA was enacted, the Corps and EPA have consistently expressed the view that all discharges of fill material—including discharges containing constituent substances subject to EPA effluent limitation guidelines—are subject to regulation under Section 404 rather than under Section 402. See Gov't Br. 26-28. That understanding of the division of permitting authority between the Corps and EPA, jointly endorsed by the agencies charged with administering the Act, is entitled to *Chevron* deference. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (deferring to "the implementing agency's expert interpretation," which "harmonizes the statutes," to resolve a potential conflict between the requirements of the CWA and those imposed by the Endangered Species Act); Alaska Br. 43-44.

Because EPA has broad discretion in establishing the relevant new-source performance standard pursuant to Section 306, SEACC cannot plausibly contend that the Corps' issuance of a Section 404 permit to Coeur runs afoul of any particularized *congressional* policy determination. Rather, SEACC's challenge to the permit ultimately reduces to the contention that the proposed discharge will subvert the *EPA* policy choice reflected in 40 C.F.R.

440.104(b)(1). But EPA is in the best position to make that determination. And SEACC's argument is contradicted by EPA's controlling interpretation of its regulations, not to mention the Corps' understanding of its own permitting authority. See *Auer*, 519 U.S. at 460-461. SEACC nevertheless takes issue with several of the agencies' pronouncements.

First, SEACC disputes the agencies' understanding of an EPA regulation, dating back to 1973, that exempts discharges of dredged or fill material into the waters of the United States from NPDES permitting requirements. The current version reads: "The following discharges do not require NPDES permits: * * * Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of the CWA." 40 C.F.R. 122.3(b). SEACC contends that the absence of a comma preceding "which" indicates that the clause is intended to be restrictive, and that some "fill material" discharges are not regulated under Section 404 (and therefore are not exempt from NPDES requirements). See SEACC Br. 47-48. That argument lacks merit.

In addition to the fact that the word "that" (rather than "which") would have been the proper relative pronoun if the clause were intended to be restrictive, see *The Chicago Manual of Style* para. 6.38, at 250 (15th ed. 2003), the regulatory history belies SEACC's understanding of 40 C.F.R. 122.3(b). The original regulation stated: "The following do not require an NPDES permit: * * * Dredged or fill material discharged into navigable waters." 40 C.F.R. 125.4(d) (1973). Over the years, EPA made minor changes to that wording without any indication that it intended to change the rule's substantive effect. In the preamble to the regulation adopting the current version, EPA stated that only "[m]inor editorial and stylistic changes * * * have been

made." 45 Fed. Reg. 33,294 (1980). The most natural reading of the current rule therefore is that discharges of fill material are categorically exempt from NPDES permitting requirements, as they clearly were under the original regulation. To the extent that any ambiguity remains, EPA's interpretation of its own regulation—as articulated before this Court—controls. See *Auer*, 519 U.S. at 461 (crediting agency interpretation in legal brief); *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1155 (2008) (same).

Second, SEACC asserts (Br. 47) that, if the 2002 fill rule is construed to encompass the discharge at issue in this case, the rule will conflict with the 1982 new-source performance standard. Contrary to SEACC's assertion (Br. 52), however, the agencies have never interpreted their regulations to preclude the issuance of Section 404 permits for discharges that constitute "fill material" but that involve constituent substances otherwise subject to effluent limitation guidelines. Before the promulgation of the 2002 fill rule, EPA had little occasion to consider whether the 1982 standard applied to discharges of "fill material" within the meaning of Section 404 because mine tailings generally did not fall within the Corps' prior definition of "fill material." See 42 Fed. Reg. 37,145 (1977) (excluding from Corps' definition of "fill material" any "pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402"). In the pre-2002 instances where the Corps did issue Section 404 permits for the discharge of mine tailings, for limited purposes such as sealing the impoundment dam at Red Dog Mine (C.A. J.S.E.R. 979), those permits did not require compliance with Section 306 standards. Thus, even before 2002, the agencies did not understand 40 C.F.R. 440.104(b)(1) to preclude the issuance of a Section 404 permit for a discharge that constituted "fill material" under the Corps' interpretation of that term. In

any event, to the extent that Section 440.104(b)(1)'s lack of an express exception for discharges of "fill material" creates a conflict with other aspects of the regulatory scheme, this Court should defer to the shared view of the Corps and EPA as to the manner in which that conflict is best resolved. See *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (giving controlling deference to agency's reconciliation of its own conflicting regulations).

Third, SEACC relies on isolated statements from the regulatory history of the fill rule suggesting that the agencies did not intend to change their regulatory approach. SEACC states (Br. 53) that, before this case, the Corps had never issued a permit for the discharge of process wastewater containing mine tailings into navigable waters. SEACC argues (Br. 55-58) that the Corps' permitting of Coeur's proposed discharges under Section 404 marks a change in course, and thus conflicts with the intent of the agencies as expressed in the rule's preamble.

Contrary to SEACC's suggestion, the Corps' prior decisions not to regulate waste-disposal activity at mine sites (at least beyond the limited Section 404 permits issued at the Red Dog and Fort Knox mines, see C.A. J.S.E.R. 979, 983-986) did not reflect the view that EPA performance standards applied to discharges of "fill material." To the extent that the Corps previously declined to exercise permitting authority over wastewater discharges similar to the one at issue here, it did so not because of any EPA performance standard, but because it did not view such discharges as involving "fill material."

The 2002 fill rule reflects an *acknowledged* change in the Corps' definition of the term "fill material," under which the term now encompasses mine tailings discharged primarily for waste disposal purposes that have the effect of replacing a portion of a covered water or changing its bot-

tom elevation. See Gov't Br. 30 & n.8. SEACC does not dispute that the discharge at issue here is "fill material" under the current regulatory definition. Although the 2002 rule will likely cause the Corps to exercise permitting authority over some discharges that it would previously have declined to regulate, that potential change in Corps practice does not suggest any change in the agencies' views on the specific legal question presented here—*viz.*, whether EPA performance standards limit the Corps' authority to permit a discharge that constitutes "fill material" under the agencies' jointly promulgated (and here uncontested) definition of that term.[4]

Notably, and not surprisingly, SEACC fails to identify *any* instance during the period before 2002 in which EPA regulated a discharge that the Corps had determined to be a discharge of fill material under the Act. See 67 Fed. Reg. at 31,135 ("EPA has never sought to regulate fill material under effluent guidelines."). And during that period, the Corps consistently regulated under Section 404 any discharge that it deemed to be a discharge of fill material. The change in the agencies' regulatory approach is thus limited to the determination of *what* constitutes "fill material," not of *how* "fill material" is to be regulated.[5]

---

[4] SEACC suggests that permitting the proposed discharge of mine tailings contradicts the statement in the fill rule's regulatory history that "no discharges that were previously prohibited are now authorized as a result of this rulemaking." SEACC Br. 15 (quoting J.A. 32a). From a practical standpoint, however, tailings discharges from mills—as demonstrated by the Red Dog and Fort Knox mines—had been previously authorized, as SEACC acknowledges (Br. 53), on the theory that the permitted discharges of fill material created an impoundment that constituted a "waste treatment system[]" (which no longer constituted waters of the United States).

[5] That fact also explains why SEACC's reliance (Br. 10, 14) on the example from the 1986 Memorandum of Agreement of titanium mining

Fourth, SEACC attempts to minimize the significance of EPA's 2004 memorandum (the Mine Tailings memorandum) interpreting the Act and applying the relevant regulations to the circumstances of this case. See SEACC Br. 58-60; J.A. 141a-149a. That memorandum was prepared in response to an inquiry from the Region X Office of Water regarding the applicability of Sections 402 and 404 to the proposed discharge of mine tailings from the Kensington mine into impounded waters of the United States. J.A. 141a-142a. It was signed by three Office Directors and was the product of consultation with EPA and Corps headquarters. *Ibid.* The Mine Tailings memorandum reflects EPA's effort "to provide the clarification Region X and the Alaska District are seeking" with regard to the very question presented in this case. J.A. 142a. It concludes that, because the proposed discharge of mine tailings would constitute a discharge of fill material under the plain text of the 2002 fill rule, "the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J), do not apply to the placement of tailings into the proposed impoundment." J.A. 144a-145a.

The fact that EPA provided its interpretation "through means less formal than 'notice and comment' rulemaking, does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002) (internal citation omitted). Although unpublished, the Mine Tailings memorandum is

---

waste discharges as subject to Section 402 is misplaced. Under the Corps' then-prevailing definition of "fill material," mining waste did not qualify as fill material subject to Section 404 if it was discharged for waste-disposal purposes. That is no longer true, however, under the plain text of the 2002 fill rule.

part of the administrative record for the Kensington mine permits and represents the considered views of the EPA. The memorandum addresses the precise issue now before this Court; it sets forth EPA's considered understanding of its own regulations and their application to this factual setting; and it played an integral role in the inter-agency consultative process that culminated in the Corps' issuance of a Section 404 permit. It is therefore entitled to substantial if not controlling deference from a reviewing court. Cf. *Long Island Care at Home, Ltd.*, 127 S. Ct. at 2349 (treating an internal "Advisory Memorandum," written in response to litigation, as the agency's "controlling" interpretation of its own conflicting regulations); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980) (deferring to memorandum created by staff of the Federal Reserve rather than the Board, and explaining that "to the extent that deference to administrative views is bottomed on respect for agency expertise, it is unrealistic to draw a radical distinction between opinions issued under the imprimatur of the Board and those submitted as official staff memoranda").

Contrary to SEACC's contention (Br. 58-59), the Mine Tailings memorandum is not inconsistent with EPA's prior interpretations of the Act or with statements in the preamble to the fill rule. To be sure, the preamble is no model of clarity with respect to the issue presented in this case. See Gov't Br. 35-37. But the overall import of the preamble is that discharges of "fill material," including mine tailings, would be subject to regulation under Section 404—just as the Mine Tailings memorandum concludes. See *ibid.*; J.A. 143a-145a. EPA's view that its new-source performance standard does not apply to the tailings discharge at issue here is also confirmed by the government's briefs filed in this Court. Likewise, the Corps' twice-considered, 68-page

Revised Record of Decision & Permit Evaluation supporting the grant of the Section 404 permit, notwithstanding the existence of the Section 306 limitation for mines using the froth-flotation process, confirms the Corps' agreement with EPA's interpretation. J.A. 340a-377a.

2. The 2002 fill rule represents the agencies' joint effort to demarcate more clearly the division of permitting authority between EPA (under Section 402) and the Corps (under Section 404). The agencies thus sought to alleviate the uncertainty caused by the lack of any statutory definition of "fill material" and by the agencies' prior conflicting definitions of that term. See 65 Fed. Reg. 21,292 (2000) (explaining that, before the fill rule was promulgated, "the Army and EPA definitions of 'fill material' differ[ed] from each other, and this * * * resulted in regulatory uncertainty and confusion"). The 2002 rule was designed to resolve that discrepancy and "ensure proper, consistent, and more effective regulation under the CWA." *Ibid.* The Corps and EPA chose to define the term "fill material" by reference to the likely effect of the discharge rather than the apparent intent of the discharger, explaining that, "where a waste has the effect of fill, * * * regulation under the Section 404 program is appropriate." 67 Fed. Reg. at 31,133; see Gov't Br. 30-32.

SEACC relies on a proposed exclusion from the definition of "fill material" for discharges from sources subject to EPA effluent limitations. SEACC Br. 56 (citing 65 Fed. Reg. at 21,297, 21,299). The agencies ultimately declined, however, to adopt that exclusion. Indeed, far from supporting SEACC's position, the fact that the exclusion was proposed and rejected demonstrates the agencies' intent that any discharge satisfying the definition of "fill material" would be regulated under Section 404 and would not be subject to EPA effluent limitations promulgated under Sec-

tions 301 or 306. See 67 Fed. Reg. at 31,135 ("EPA has never sought to regulate fill material under effluent guidelines.").[6]

SEACC therefore misses the point in arguing (Br. 46) that the 2002 fill rule is "merely a definition that does not, by itself, purport to authorize anything." To be sure, identification of a particular discharge as "fill material" does not, in and of itself, resolve the question of what substantive standards the discharger must satisfy in order to receive a CWA permit. Under the plain language of Sections 402 and 404, however, identification of a discharge as "fill material" does establish that the Corps rather than EPA is the appropriate permitting agency. And the statutory and regulatory scheme as a whole makes clear that the Corps' permitting decisions are governed by criteria (the Section 404(b)(1) Guidelines) that contain no reference to performance standards issued by EPA pursuant to Section 306.

The 2002 fill rule defines "fill material" as material that has "the effect of * * * [c]hanging the bottom elevation of any portion of a water of the United States," 33 C.F.R. 323.2(e)(1); 40 C.F.R. 232.2, and it defines "discharge of fill material" to include the "placement of overburden, slurry, or tailing or similar mining-related materials," 33 C.F.R. 323.2(f); 40 C.F.R. 232.2. SEACC acknowledges (Br. 46) that the definition is unambiguous, and it does not dispute

---

[6] SEACC argues that giving effect to the failed exclusion for discharges subject to effluent limitations would not render meaningless the fill rule's inclusion of tailings as fill material, because certain mineral tailings are not subject to EPA effluent limitations. See SEACC Br. 57. But the regime that SEACC advocates would force dischargers that produce virtually identical waste (all of which constitutes "fill material") to examine EPA's various effluent limitations and determine whether any apply to their own mining operations—just to identify with agency has permitting authority over a particular discharge. The agencies sensibly avoided such a regime in the fill rule.

the agencies' determination that the proposed discharge of mine tailings at issue in this case constitutes a "discharge of fill material" under the regulation. Based on the discussion above, that ends the matter: under the Act, as interpreted by the Corps and EPA, any discharge that qualifies as a "discharge of fill material" is to be regulated under Section 404, not Section 402, and thus need not comply with Section 306 performance standards.

SEACC finally contends (Br. 58) that, if the fill rule renders EPA performance standards inapplicable to process-wastewater discharges like the one at issue here, the rule is invalid because the agencies failed adequately to explain their purported departure from prior enforcement practices. As explained above, however, the fill rule altered existing agency understandings only by adopting a uniform definition of "fill material" that encompassed some discharges the Corps had previously declined to regulate. The preamble to the rule acknowledged that change and fully explained the agencies' rationale for adopting the current definition. See Gov't Br. 30-32; *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'") (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996). The agencies' determination in this case that EPA performance standards are inapplicable to discharges of "fill material" did not reflect a change in policy, since EPA has never applied a Section 306 standard of performance to a discharge over which the Corps had regulatory jurisdiction under Section 404. See pp. 14-16, *supra*.

SEACC is therefore wrong in contending that the Corps' permitting decision here constitutes an unexplained

departure from prior agency practices. It is perfectly consistent with prior agency practices, with the agencies' interpretation of their statutory responsibilities under the CWA, and with the plain terms of the Act itself. And that permitting decision is therefore entitled to effect.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

DECEMBER 2008